

ADMINISTRATION ORDERS FOR MISSING PERSONS' ESTATES – KEY INFORMATION

On 28 October 2010, new provisions in the *Guardianship and Administration Act 1986* commenced, allowing the Victorian Civil and Administrative Tribunal (VCAT) to appoint an administrator to manage the property and financial matters of a missing person.

This document provides some key information on the new process. However, it is not intended to be a substitute for legal advice.

The legislation

Part 7 of the *Justice Legislation Further Amendment Act 2010* inserted a new Part 5A into the *Guardianship and Administration Act*. Part 5A enables the making of administration orders in respect of the estate of a missing person. On 19 October 2010, Part 7 of the *Justice Legislation Further Amendment Act* was proclaimed to commence on 28 October 2010.

When can an application be made?

VCAT will be able to make an order appointing an administrator for the estate of a missing person if satisfied that:

- the person in respect of whom the application is made is a missing person
- the missing person usually resides in Victoria
- while the person is missing, there is, or is likely to be, a need for a decision in relation to their financial matters or property and the order is in the best interests of the person while missing
- an application is not on foot or an order made under section 24A of the *Administration and Probate Act 1958*.

[See section 60AB(1)]

Note that section 24A of the *Administration and Probate Act* also allows a trustee company, including State Trustees, to apply to the Supreme Court for an order authorising it to deal with property in circumstances where the owner of the property cannot be found or it is not known whether the owner is alive or dead.

When will a person be a missing person for the purposes of an application?

VCAT may be satisfied that a person is a missing person if satisfied that:

- it is not known whether the missing person is alive
- reasonable efforts have been made to find the missing person
- for at least 90 days, the missing person has not contacted anyone who lives at their last-known address, or any relative or friend with whom the person is likely to communicate.

[Section 60AB(2)]

How do you establish that it is not known whether the missing person is alive?

Knowledge of whether a person is alive refers to knowledge of those who would ordinarily be expected to have seen, or heard from or of, the missing person. It also refers to knowledge that the missing person is not dead, which may involve evidence of the results of any police enquiries or any physical search carried out in the area where the missing person disappeared. It may also involve there being no evidence of a deliberate disappearance.

What is meant by making reasonable efforts to find the missing person?

Reasonable efforts to find the missing person will depend on the particular circumstances of the case. However, they could include:

- informing the police
- the results of any police investigation
- carrying out a physical search and/or an internet search

- seeking media publicity
- listing the missing person on www.missingpersons.gov.au
- the involvement and enquiries by organisations such as the Salvation Army or Red Cross.

Who may be appointed as an administrator of a missing person's estate?

Any person can apply to VCAT for an order appointing an administrator in respect of the estate of a missing person [section 6oAA]. Certain people are entitled to notice of an application, as well as a notice of hearing of the application and notice of any order made. These people are: the missing person's nearest relative available, the missing person's primary carer or guardian, the Public Advocate and any person who has advised VCAT of an interest in the missing person or his or her estate [section 44 and 6oAI].

VCAT may appoint as an administrator a person who consents to act as administrator if VCAT is satisfied that the person:

- will act in the best interests of the missing person
- is not in a position where their interests conflict with the interests of the missing person
- is a suitable person to act as administrator
- has sufficient expertise to administer the estate or there is a special relationship or other special reason why he or she should be appointed as administrator.

[Section 47 and 6oAI]

In determining whether a person is suitable, VCAT must take into account the wishes of the missing person, so far as they can be ascertained. VCAT may also appoint State Trustees as administrator of a missing person's estate.

What can an administrator do?

An administrator for a missing person's estate must act in the best interests of the missing person. An administrator acts in the best interests of the missing person if they only takes actions that they consider necessary or desirable for:

- the payment of the debts and engagements of, and otherwise for the benefit of, the missing person
- the maintenance and benefit of dependants of the missing person
- the care and management of the estate of the missing person.

VCAT may appoint an administrator to administer all or just a specified part of the estate of the missing person. In the order appointing the administrator, VCAT must specify the kinds of decisions the administrator may make and the parts of the estate in relation to which the power may be exercised.

Subject to the VCAT order, an administrator may, amongst other things:

- execute documents other than a will
- collect, receive and recover income
- pay any debts and settle any demand against the estate
- with VCAT's consent, sell, exchange, partition or convert property
- pay a sum for the maintenance of the missing person's dependants.

An administrator is not able to make a gift out of the missing person's estate.

The intention of the new scheme is to permit a limited use of property where there is a demonstrated need for decisions to be made and it is in the best interests for an administrator to be appointed to make these decisions while the person is missing.

[Sections 48 - 50, 58B and 6oAI]

When does administration of a missing person's estate end?

The appointment of an administrator must not last longer than two years. Upon application, VCAT will be able to extend an appointment for up to two more years [section 6oAE]. VCAT is also able to make a temporary administration order [sections 6oAF and AG].

Otherwise, VCAT is able to order the removal of an administrator of a missing person's estate on application by the missing person. VCAT may also order the removal of an administrator on application by someone else if satisfied that the missing person is alive, or dead or may be presumed to be dead.

VCAT must order the removal of an administrator of a missing person's estate if the Supreme Court is satisfied that the missing person has died and makes a grant of probate of the missing person's will, or if the presumption of death has been successfully invoked for other legal proceedings.

VCAT must also order the removal of an administrator where the missing person's estate becomes subject to an order under section 24A of the *Administration and Probate Act 1958*. [Section 6oAD]

How will the costs of administering a missing person's estate be paid?

An administrator will only be entitled to payment of fees or remuneration from the estate where VCAT has specified this in the administration order. However, State Trustees will be entitled to charge and receive fair and reasonable commissions, fees and remuneration and recover fair and reasonable disbursements for an administration. In appropriate cases, a court or tribunal may approve payment of reasonable costs out of the missing person's estate [sections 47A and B and 6oAI].

In addition to this, the Guardianship and Administration (Fees) Regulations 2008 set out annual fees to be paid in respect of estates that are the subject of an administration order under the Guardianship and Administration Act.

Further information

- A copy of the Guardianship and Administration Act can be downloaded from the Victorian Legislation and Parliamentary Documents website (www.legislation.vic.gov.au) by following the links under "Victorian Law Today".
- A copy of the Explanatory Memoranda for the new provisions is also available from this website under "Parliamentary Documents". Please see Part 7 of the Justice Legislation Further Amendment Bill 2010.
- The proclamation of commencement was published in the Victorian Government Gazette of 21 October 2010 (G42):
<http://www.gazette.vic.gov.au/gazette/Gazettes2010/GG2010G042.pdf>.
- Information about the new provisions is available on the VCAT website:
<http://www.vcat.vic.gov.au/CA256DBB0022825D/page/Listing-Home+Page+News-Missing+Persons'+Estates?OpenDocument&1=Home~&2=~&3=~&REFUNID=~>.
- On 12 November 2010, VCAT made its first order appointing an administrator for a missing person's estate. VCAT decisions are available from the Australasian Legal Information Institute website (<http://www.austlii.edu.au/au/cases/vic/VCAT/>).
- On 23 November 2010, the Victoria Law Foundation announced a funding grant to the Loddon Campaspe Community Legal Centre to develop and promote legal information and educational resources to utilise the new provisions.